Supreme Court, U.S.
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OFFICE OF THE CLERK

No. 95-

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

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THE CLASS OF 48+1 AND THE
INTERVENOR PLAINTIFFS, SUCCESSORS
IN INTEREST TO MITCHELL G. KING, JR.,
Petitioners,
v.
MILTON GREENBLATT, M.D., LESLIE TAYLOR,
CHARLES W. GAUGHN AND M.C.I. BRIDGEWATER,
Respondents.

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# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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# APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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48DP

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**APPENDIX A**

**United States Court of Appeals**
**For the First Circuit**

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No. 94-1751

MITCHELL G. KING, ET AL.,
Plaintiffs, Appellees,

v.

MILTON GREENBLATT, LESLIE TAYLOR,
CHARLES W. GAUGHAN, M.C.I. BRIDGEWATER
Defendants, Appellants.

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APPEAL FROM THE CITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. A. David Massone, Senior U.S. District Judge]

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Before
Torruella, Chief Judge,
Bownes, Senior Circuit Judge,
and Stahl, Circuit Judge.

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William L. Pardee, Assistant Attorney General, with whom Scott Harshbarger, Attorney General, and Scott M. Davis, Assistant Attorney General, were on brief for appellants.

Anthony A. Scibelli, with whom Robert D. Keefe, Stephen C. Reilly, and Hale and Dorr, were on brief for appellees The Class of 48 + 1; David R. Geiger, with whom Sarah B. Reed, and Foley, Hoar & Eliot, were on brief for intervenors/appellees Donald Pearson, et al.

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April 6, 1995

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**BOWNES, Senior Circuit Judge**. This is the latest chapter in the institutional reform litigation brought in 1972 by plaintiff Mitchell King, then a civilly-committed patient of the Massachusetts Treatment Center for Sexually Dangerous Persons in Bridgewater, Massachusetts, to correct allegedly unconstitutional practices by the Department of Correction (DOC) at the Treatment Center. The history of the litigation has been exhaustively covered: *In re Pearson*, 990 F.2d 653 (1st Cir. 1993) (*Pearson III*), *Pearson* v. *Fair*, 935 F.2d 401 (1st Cir. 1991) (*Pearson II*), *Langton* v. *Johnston*, 928 F.2d 1206 (1st Cir. 1991), *Williams* v. *Lesiak*, 822 F.2d 1223 (1st Cir. 1987), and *Pearson* v. *Fair*, 808 F.2d 163 (1st Cir. 1986) (per curiam) (*Pearson I*). We review the case history only to put this appeal in perspective.

## I.

King alleged that he had been deprived of due process and other federal constitutional rights by the defendants, specifically by officials of the DOC, who allegedly placed him in solitary confinement without notice of the charges against him or a meaningful opportunity to be heard. DOC's actions allegedly interfered with King's treatment by the Department of Mental Health (DMH), the agency vested with primary jurisdiction over the Treatment Center. *See* Mass. Gen. L. ch. 123A, § 2.[1] Thus, an element of this

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1 Section 2 of ch. 123A (as amended through St. 1959, ch. 615) provided in pertinent part: "The commissioner of mental health shall establish and maintain, subject to the jurisdiction of the department of mental health, a treatment center . . . at a correctional institution approved by the commissioner of correction, for the care, custody, treatment and rehabilitation of [sexually dangerous] persons . . . . The commissioner of correction shall appoint such custodial personnel as may be required for such center. Such custodial personnel shall be subject to the control of the commissioner of mental health with respect to the care, treatment and rehabilitation of persons in their custody, but shall at all times be under the administrative, operational and disciplinary control of the commissioner of correction. The commissioner of mental health shall appoint to such center, in addition to the personnel appointed by the commissioner of correction, adequate personnel for the care, treatment and rehabilitation of such persons committed to their care.

litigation, present from the very beginning, has been DOC's alleged usurpation of DMH's statutory authority over patients at the Treatment Center, during which usurpation the patients' constitutional rights were allegedly violated. Invoking both the Federal Constitution and state law, King sought declaratory and injunctive relief from the DOC's sequestration practices.

In 1974, the district court held a hearing on King's allegations and entered a consent decree that provided, in relevant part:

> 1. The Treatment Center at MCI Bridgewater shall be treated as a facility of the Department of Mental Health.
>
> 2. Primary responsibility and authority for the Treatment Center shall be exercised by the Department of Mental Health.
>
> 3. All personnel at the Treatment Center (clinical, custodial, administrative) shall be subject to the control of the Commissioner of Mental Health with respect to the handling of patients.
>
> 4. Custodial personnel, but not patients, shall be under the administrative, operational and disciplinary control of the Commissioner of Correction.
>
> 5. The Department of Mental Health shall exercise the responsibility and authority set forth in subparagraph 2 above so that patients at the Treatment Center should have the least restrictive conditions necessary to achieve the purposes of commitment. . . .

The first four paragraphs of the consent decree closely track the requirements of ch. 123A, § 2, the law in effect when the

consent decree was entered.[2]

Over time, the residents of the Treatment Center brought various suits to enforce or to modify the consent decrees. In 1988, the Commonwealth sought unsuccessfully to vacate the decrees. "The stream of litigation occasionally overflowed the district court," *Pearson III*, 990 F.2d at 655, and this court as well.

While the residents were attempting to enforce the consent decrees, forces on the sidelines of the litigation were mobilizing to amend ch. 123A. Beginning in 1986, Massachusetts' executive branch filed a number of legislative bills that sought to transfer control of the Treatment Center from DMH to DOC. None of these bills were adopted until 1994, when the Massachusetts legislature enacted St. 1993, ch. 489. Chapter 489 purports to transfer all authority over the Treatment Center to the DOC, in direct contravention of the first five paragraphs of the consent decree. Section 2 of ch. 489 provides that "[t]he commissioner of correction shall maintain subject to the jurisdiction of the department of correction a treatment program or branch thereof at a correctional institution for the care, custody, treatment and rehabilitation of persons [ad]judicated as being sexually dangerous."

The defendants immediately moved under Fed. R. Civ. P. 60(b)(5) to modify the decree so that DOC might assume plenary authority over the Treatment Center, subject to all other substantive and procedural requirements of the

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2 The district court also entered a supplemental consent decree that (1) prohibited defendants from using solitary confinement for the purposes of discipline or punishment; and (2) imposed various procedural and substantive requirements for the use of sequestration. The defendants do not seek to modify the supplemental consent decree.

decree.[3] Their sole argument was that the Massachusetts legislature's enactment of ch. 489 constituted "a significant change in circumstances warrant[ing] revision of the decree." *See Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367, 383 (1992) (setting forth standard for modification of consent decrees, and reversing the decision of this circuit).

The district court denied the motion from the bench: "On the record that is now before me, and incorporated into that record, everything that I have learned about the case and found in the case from the trials of the *Bruder* and the *Pearson* cases [companion cases], I will conclude at this time that the defendants have not sustained their burden of showing a significant change in law or fact under Rufo." The court also made the following findings:

> I do find that the consent decrees sought to address federal constitutional violations articulated by *King* and in *Williams* [a related case].
>
> A critical component of the remedy provided by the consent decrees was that the Department of Mental Health was in control of the Treatment Center which was to provide, in part, a check on the Department of Correction[,] which compromised treatment.
>
> I conclude that the Department of Mental Health is an essential part of the decree, and on the record before me at this time, the Department of Correction has done nothing yet that I can see which warrants my placing confidence in its ability to deliver . . . patient treatment.
>
> I conclude at this time that the Department of Correction's control of the Treatment Center compromises the federal constitutional remedy which

---

[3] The defendants also moved to reopen *Williams* v. *Lesiak*, a related litigation that involved a similar consent decree. *See Williams*, 822 F.2d at 1224. The district court did not rule on the motion because counsel had not yet been appointed for the plaintiffs in *Williams*.

> the consent decree sought to impose, and would compromise the federal constitutional rights which the consent decrees sought to protect.
>
> . . . .
>
> Will the Department of Correction provide th[e] same treatment [as DMH]? That's not shown. If they were to provide that treatment, if there were to be a case-specific inquiry in what the Department of Correction was going to do and proposed to do, then perhaps I would be able to rule otherwise. But at this point, there is not that showing. . . .

The district court invited the Commonwealth to propose ways to modify the decree that would preserve the federal constitutional remedies, and yet accommodate the change in the underlying state law. It noted, however, that "we're not going to go anywhere" before the defendants have tested the court's interpretation of *Rufo* on appeal.[4] Undeterred, the defendants filed a renewed motion for modification and a motion to vacate the consent decrees while this appeal was pending.

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4 We asked the parties to brief the issue of our appellate jurisdiction in light of *Carson* v. *American Brands, Inc.*, 450 U.S. 79, 84 (1981), which, in the context of an appeal from an interlocutory order refusing to *enter* a consent decree, applied the general rule that an appeal under 28 U.S.C. § 1292(a)(1) is available only if the order "might have a 'serious, perhaps irreparable consequence,'" and can be "'effectually challenged' only by immediate appeal" (citations omitted). Assuming, without deciding, that these conditions apply where the district court refuses to *modify* a longstanding consent decree, we think the appeal is properly before us. In particular, the district court's forecast of a stalemate pending appeal suggests that its order can be effectually challenged only by immediate appeal.

We also note that *Rufo* itself was an interlocutory appeal from the denial of a Rule 60(b)(5) motion to modify a consent decree. Neither the Supreme Court nor we, however, addressed the jurisdictional issues in that case.

## II.

We review the district court's application of the *Rufo* standard, and the more general requirements for granting relief from a final judgment under Rule 60(b)(5), for errors of law or abuse of discretion. *See Alexis Lichine & Cie.* v. *Lichine Estate Selections, Ltd.*, No. 94-1918, slip op. at 10 (1st Cir. Jan. 30, 1995). *Rufo* held that "a party seeking modification of a consent decree bears the burden of establishing that a significant change" in either factual conditions or in law "warrants revision of the decree." 502 U.S. at 383-84. If the moving party meets this standard, "the court should consider whether the proposed modification is suitably tailored to the changed circumstance." *Id.* at 383. This "standard . . . applies when a party seeks modification of a term of a consent decree that arguably relates to the vindication of a constitutional right." *Id.* at 383 n.7.

*Rufo* instructed district courts to "exercise flexibility in considering requests for modification of . . . institutional reform consent decree [s]" because such decrees "'reach beyond the parties involved directly in the suit and impact on the public's right to the sound and efficient operation of its institutions.'" *Id.* at 381, 383 (quoting *Heath* v. *De Courcy*, 888 F.2d 1105, 1109 (6th Cir. 1989)). We have echoed these concerns. *See, e.g., Pearson III*, 990 F.2d at 658 ("In institutional reform litigation, injunctions should not operate inviolate in perpetuity."); *Mackin* v. *City of Boston*, 969 F.2d 1273, 1275 (1st Cir. 1992) ("we believe that district courts should be flexible in considering requests for relaxation of, or release from, decrees which were initially established to bring about needed institutional reforms"), *cert. denied*, 113 S. Ct. 1043 (1993). Notwithstanding the application of this "less stringent, more flexible standard," a modification "must not create or perpetuate a constitutional violation." *Rufo*, 502 U.S. at 380, 391.

## III.

We shall refer to the first five paragraphs of the 1974 consent decree as "structural" terms, inasmuch as they incorporate the administrative structure mandated by state law. These are the only terms the defendants seek to modify.

For the purposes of their motion, the defendants assume that the structural terms "arguably relate[] to the vindication of a constitutional right." *Id.* at 383 n.7. Of course, if the terms at issue were directly *mandated* by the Constitution, a change in state law without more would not warrant a modification. Modifiable terms will typically fall somewhere along a spectrum: in general, terms that directly implement constitutional requirements -- *e.g.*, a predeprivation hearing to satisfy procedural due process -- will be more closely related to the vindication of a constitutional right than terms that lay the groundwork for other remedial measures.

We think that the structural terms in this case belong in the latter class. The Constitution itself is indifferent to whether DOC or DMH administers the Treatment Center. *If*, however, as King alleged, DOC personnel violated his constitutional rights in the process of usurping DMH's authority and interfering with his clinical treatment, then a decree keeping DOC within its statutory ambit begins to make sense in the context of a constitutional remedy. Although we, unlike the district court, would have eschewed the words "essential" and "critical," we think the structural terms were clearly, not just arguably, related to the constitutional remedy provided by the decrees.

This is not to say that a change in the statutory scheme cannot be a significant change in law that warrants modification of the structural terms.[5] In the context of *King*, the structural terms may have been a means to a constitutional end; but it was possible to include them in the decree only because Massachusetts law already structured the Treatment Center in the same way. If existing state law had granted DOC exclusive jurisdiction over the Treatment Center, the parties could not have agreed to insert DMH into the administrative structure. Thus, a change in the very law underlying the structural terms is likely to be "significant"

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5 In *Rufo* itself, the Supreme Court remanded for reconsideration under the standard it had just announced, even though "the agreed-upon decree . . . clearly was related to the conditions found to offend the Constitution." 502 U.S. at 389.

under *Rufo*, and may therefore require some modification of the structural terms.

This preliminary analysis is consistent with our own decisions before and after *Rufo*. In *Rufo*, the Supreme Court offered several examples of potentially significant changes in federal law. *See id.* at 388-90 ("one or more of the obligations placed upon the parties has become impermissible under federal law"; "the statutory or decisional law has changed to make legal what the decree was designed to prevent"; "a decision that clarifies the law" has undermined an agreement based on "a misunderstanding of the governing law"). Although none of the examples from *Rufo* is on point here, our decision in *Williams*, which predated *Rufo*, suggests the proper test for significance in this case. If a subsequent state statute appears to overlap or conflict with a federal consent decree, "and the conflict . . . is less than clear, delicate questions of federalism must enter into our inquiry." *See id.*, 822 F.2d at 1228 (citing *Rizzo* v. *Goode*, 423 U.S. 362, 379 (1976) (federalism must be considered in determining scope of equitable relief)). The district court should conduct a "careful case-specific inquiry" into both the decree and the statute "to discover whether their objectives and provisions necessarily conflict and to consider the importance of the areas of conflict to the overall goals of the litigation." *Id.*

We think that the nuanced, case-specific approach of *Williams* is consistent with the strictures of *Rufo* and with the equitable nature of relief from a decree under Rule 60(b)(5). *See Rufo*, 502 U.S. at 383 (noting that Rule 60(b)(5) permits relief from a court order when "'it is no longer equitable that the judgment should have prospective application'"). *See also Mackin*, 969 F.2d at 1278 ("the decision as to whether to modify or dissolve [a structural decree] is at bottom an exercise of equitable power" that calls for a "deferential standard of review").

Chapter 489 reflects Massachusetts' legislative judgment that one agency rather than two can best perform the conflicting functions of the Treatment Center, *i.e.*, maintain security as well as provide treatment. As the district court noted, no one regards dual administration of the

Treatment Center as workable. But why give *DOC* the run of the place? The legislature apparently accepted the professional opinion that behavior modification or control, rather than traditional mental health treatment, is the most effective way to protect society from sexually dangerous persons and such persons from themselves. The correctness of this view is not before us; what matters is whether the goals of ch. 489 necessarily conflict with the rights enforced by the federal consent decree, and the importance of any such conflict to the overall goals of the litigation. *Williams*, 822 F.2d at 1228.

The extent and importance of the conflict can be exaggerated or trivialized, as the parties have tried to do. We think that the conflict is real but not so fundamental that ch. 489 necessarily thwarts the overall goals of the *King* litigation. King's primary goal was to ensure that his treatment complied with the Constitution. The structural terms of the decree may serve that goal by keeping DOC, allegedly the offending actor, out of DMH's province; but as we have explained, those terms would have been inconceivable without the underlying state law. After all, plaintiffs cannot claim that DOC control *per se* violates the Constitution. With the amendment of ch. 123A, the governing state law no longer gives DMH any role to play. In light of these federalism concerns, we think there has certainly been a "significant change . . . in law" within the meaning of *Rufo*, and that the plaintiffs cannot enforce the structural terms of the decree in perpetuity. *See Pearson III*, 990 F.2d at 658.

In holding that the defendants had not shown a significant change in law, the district court apparently relied upon our decision in *Coalition of Black Leadership* v. *Cianci*, 570 F.2d 12 (1st Cir. 1978). The consent decree in *Cianci* established a procedure whereby residents of Providence, Rhode Island, could file complaints against their police officers for alleged civil rights violations. The Rhode Island legislature subsequently enacted a "Law Enforcement Officers' Bill of Rights" which conflicted in part with the decree. There was an "obvious subject matter overlap between the decree and the legislation," which served "dual and partially inconsistent purposes." *Id.* at 14. The City of

Providence moved to vacate the decree, and the district court denied the motion. We affirmed, noting that the court had "*ordered both parties to work out modifications in the decree* so that the protection of policemen's rights mandated by state law and the right of plaintiffs to be free from 'racially discriminatory police conduct' could[,] to the extent possible, both be achieved." *Id.* at 13 (emphasis added). Moreover, we emphasized the district court's statement that

> the Court is inclined to look with deference upon the alternate procedural means embodied in the 1976 Act . . . . If the Rhode Island legislature has determined that the rights of police officers are in need of protection and that this protection can best be achieved by adoption of certain procedural protections, the Court is not prepared to question this judgment or to stand in the way of its implementation in the absence of any showing that the 1976 Act will hamper the effective presentation of civilian complaints which the consent decree has apparently accomplished.

*Id.* at 14 n.1. We approved the district court's flexible approach for resolving the conflict between the decree and the Act, even though the decree in *Cianci*, unlike that in *King*, did not incorporate an administrative structure based on superseded state law. *Cf. Williams*, 822 F.2d at 1234 n.5 (on remand, "[a]s in *Cianci* . . . the court should be flexible in framing a response to the motion to avoid any conflict with the state statute when unnecessary for the goals underlying this litigation"). If anything, this case presents the stronger argument for modification, given the source of the structural terms, their relationship to the constitutional remedy, and the legislature's autonomy to restructure the governmental institutions of the Commonwealth.

## IV.

Having found a significant change in law, we now "focus . . . on whether the proposed modification is tailored to resolve the problems created by the change in circumstances." *Rufo*, 502 U.S. at 391. "Of course, a

modification must not create or perpetuate a constitutional violation." *Id.* at 391.

The district court evidently feared that the proposed modification would produce a *de facto* increase in constitutional violations at the Treatment Center, even if there is nothing unconstitutional *de jure* about DOC's assuming plenary authority. Based on its assessment of the history of this litigation, the court concluded "at this time" that DOC's control of the Treatment Center would compromise the federal constitutional remedies imposed by the consent decree, and the federal constitutional rights that the decree sought to protect. Critically, the defendants had not shown "what the Department of Correction . . . proposed to do" to "provide th[e] same treatment" as DMH under the remainder of the decree. Had the defendants made such a showing, "then perhaps [the district court] would be able to rule otherwise."

This leaves us unsure of the district court's reason(s) for denying the proposed modification. Earlier in the hearing, the court had ruled that ch. 489 is not a significant change in law. Perhaps it was now saying that ch. 489 *might* be a significant change in law that warrants modification of the consent decree, but the defendants had not yet demonstrated *as a practical matter* that the modification would be implemented without producing or exacerbating constitutional violations at the Treatment Center. In fact, the defendants submitted no testimonial or documentary evidence of DOC's transfer plans; nor did they request an evidentiary hearing. On the sparse record before the district court, in light of the court's inconsistent observations, we cannot say whether the court properly denied modification for lack of suitable tailoring. *See Rufo*, 502 U.S. at 383. The prudent course is to remand for a new hearing.

On remand, the district court may inquire into DOC's transfer plans. We note, however, that "once a court has determined that a modification is warranted, . . . principles of federalism and simple common sense require the court to give significant weight to the views of the local government officials who must implement any modification." *Id.* at 392 n.14. "[T]he public interest and considerations based on the

allocation of powers within our federal system . . . require that the district court defer to local government administrators, who have the 'primary responsibility for elucidating, assessing, and solving' the problems of institutional reform, to resolve the intricacies of implementing a decree modification." *Id.* at 392 (quoting *Brown* v. *Board of Educ.*, 349 U.S. 294, 299 (1955)) (other citations and quotation marks omitted). The district court should rely primarily on its jurisdictional oversight to ensure DOC's compliance with the decrees.

**Remanded**.

## APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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|---|---|---|
| MITCHELL G. KING | * | |
| Plaintiff | * | |
| vs. | * | CIVIL ACTION |
| | * | No. 72-788 |
| MILTON GREENBLATT, ET AL | * | |
| Defendants | * | |
| | * | |

* * * * * * * * * * * * * * * * * * * * * * *

BEFORE THE HONORABLE A. DAVID MAZZONE
UNITED STATES SENIOR DISTRICT JUDGE
HEARING

May 27, 1994

APPEARANCES:

HALE AND DORR, (By Steven C. Reilly, Esq.), 60 State Street, Boston, Massachusetts 02109, on behalf of Plaintiffs

FOLEY, HOAG & ELIOT, (By David R. Geiger, Esq.), One Post Office Square, Boston, Massachusetts 02109, on behalf of Intervenor-Plaintiffs

COMMONWEALTH OF MASSACHUSETTS, (By William L. Pardee, Assistant Attorney General), Administrative Law Division, One Ashburton Place, Boston, Massachusetts 02108, on behalf of Defendant

Courtroom No. 5
Post Office & Courthouse Bldg.
Boston, Massachusetts 02109

Jill K. Ruggieri, CSR, RPR, CM
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Boston, Massachusetts 02109

## PROCEEDINGS

THE COURT: Morning, counsel. Sorry, I was delayed with another matter. We last met in March. Mr. Pardee is here, Mr. Savage, Mr. Keefe -- Mr. Keefe not here.

MR. REILLY: Your Honor, my name is Stephen Reilly. I'm here from Hale and Dorr working for Mr. Keefe who is not available today and apologizes for his absence. He had a previously schedule court appearance in Marlborough, I believe, but I will be arguing in his place.

THE COURT: And, sir?

MR. DAVIS: Assistant Attorney General Scott Davis. I'm here with Mr. Pardee.

THE COURT: I note the presence of Mr. Gleason and Mr. Gosselin. Mr. Gosselin, one of the formerly pro se plaintiffs for -- I'm not quite sure, intervenor-plaintiffs or 48-and-one plaintiffs. I'm not sure, but it's good to have him here as well.

Now, the last time we met, I said that while the motions were pending, I would not rule on those motions at that time, and I requested of Mr. Pardee some brief position of the Attorney General as well as other counsel on where this matter was going.

You all know that I have kept this matter and have wanted to use the *King* case as the vehicle to try to do something about the administrative tension, for lack of a better word at this time, that exists at the Treatment Center.

It was an attempt by me to reconcile the conflicts between the Department of Corrections and the Department of Mental Health which has caused this court to be inundated with cases over the 20 years or so that the consent decrees have been in effect.

I still think that something should be done about the consent decrees and something should be done about the operation of the Treatment Center. I'm not sure what that is,

but today I'm confronted with the Attorney General's motions and apparently some urgency to those motions.

As you know, Mr. Keefe and Hale and Dorr has consented to represent the plaintiffs who are not represented by Mr. Geiger, are here. And perhaps we can resolve the motions today.

I'm prepared to resolve those motions today. The Commonwealth has requested a modification of the consent decrees in both *King* and in *Williams v. Lesiak*.

As I understand the current posture, those cases have not -- *Williams* has not been reopened, and it has not been consolidated with *King v. Greenblatt*; but, counsel, I see no reason why we shouldn't at least clarify that and reopen *Williams* if it hasn't been and consolidate the matter so we can go forward with both cases in the same posture since the consent decrees track each other in both cases.

So why don't we at least take that preliminary step, and I will reopen the *Williams v. Lesiak* case and consolidate it with *King v. Greenblatt* case.

MR. GEIGER: Can I make an observation on this? We're not parties in *Williams*. And I simply note, as we've said before, that the *King* case really did -- was driven by the issue of seclusion at the Treatment Center, and the *Williams* case was really driven by the issue of right to treatment.

And there was other counsel, as Your Honor knows, who was in that case, and so I simply note that they are not here. And if you open them, I don't know if that creates a procedural --

THE COURT: Well, that is true. I was going to get to that, Mr. Geiger, and really didn't want to bite off that big a morsel because I wanted Mr. Keefe to be here when I asked if, perhaps, he might look at the global picture, but I didn't want to do that because he's not here, and I'm not so sure that Mr. Reilly has the authority to commit Hale and Dorr to that.

So *Williams* is closed, you see. I can reopen it, and if counsel needed and perhaps additional counsel needed, then maybe I'll cast my net a little further in the Boston legal community and see if I can come up with another fish, Mr. Reilly, who will help us out in this case.

MR. REILLY: We would appreciate that, Your Honor, and your observation was correct. I'm not authorized --

THE COURT: I didn't want to put you in the position of having to say that, Mr. Reilly.

MR. REILLY: Well, no embarrassment on my part.

THE COURT: Well, we're again on the modification the Commonwealth has requested. The legislature has passed new legislation that transfers control of the Treatment Center for all purposes from the joint administration of the Department of Mental Health and Corrections to the sole administration of the Department of Corrections. The modifications are intended to bring both consent decrees in line with the new legislation.

The legislation removes all references to the Department of Mental Health, places control of the Treatment Center exclusively in the Department of Corrections, and it seems to me that a key phrase of that legislation or a section of that legislation is that it requires that the Commissioner of Corrections -- and I'm going to read this -- "shall maintain a treatment program or branch thereof at a correctional institution for the care, custody, treatment and rehabilitation of persons as adjudicated as being sexually dangerous."

That modification strikes the first four paragraphs in each of the consent decrees in *King* and in *Lesiak* and in, I should say, *Williams*.

That legislation simply puts all personnel, including custodial personnel, under the control of the Department of Corrections, and that includes handling of patients.

Now, the legal standard for modifying the consent decree was articulated fairly recently by the Supreme Court

in *Rufo v. The Inmates of Suffolk County Jail*. And that held, Mr. Pardee, that the person who moves for modification must take two steps: Show a significant -- either a significant change in factual conditions or in law. And if that step is taken, then the Court should determine whether the proposed modification is suitably tailored to the changed circumstances.

I'm given some guidelines in evaluating the modifications, and they are that the modification must not create or perpetuate a constitutional violation; that the Court should not strive to rewrite a consent decree so that it conforms to the constitutional floor.

There are some considerations given to the public interest and considerations based on the allocation of powers within our federal system. There is a constraint that the district court should defer to local government administrators who have the primary responsibility for elucidating, assessing and solving the problems of institutional reform. Financial considerations may not be used to justify a constitutional violation, but they are a legitimate concern of government defendants in institutional reform litigation.

These are some of the guidelines that I am given. The Commonwealth wants this legislative change. As I read their submissions, they cite back to the Governor's Special Advisory Panel on Forensic Mental Health which concluded in September of 1989 that the current system has neither enhanced public safety nor successfully treated these offenders. I'm quoting from the report.

The Special Master reported that -- again, I quote him -- "No one" regards the Department of Mental Health/ Department of Corrections joint control of the Treatment Center as workable, and he supports his comment with references to numbers of officials, attorneys, patient-inmates as well as perspectives of correctional officials about how the current arrangement is working.

They also cite that the vast majority of states have repealed similar laws for sexually dangerous offenders.

So from the Commonwealth's perspective -- correct me if I'm wrong, Mr. Pardee, because now it's going to be your turn -- you regard this as a purely administrative matter, it seems to me.

You simply say -- again, I think -- that the legislature has found a new solution to the problem of treating sex offenders in the Commonwealth. You say that the original consent decrees which, again, divided the administration between Corrections and Mental Health, simply tracked the statutory language that then was in the statute.

And now that the statute has been changed, you say that the consent decrees ought to be brought into line with the changes in the new law. And you say that is one of the prongs of the *Rufo* test, citing *Rufo* that modifications may be warranted when statutory or decisional law has changed to make legal what the decree was designed to prevent.

So you want the Department of Mental Health to drop out of the picture because, you say -- and this is where I think I'm having the greatest difficulty, Mr. Pardee -- you say the Department of Corrections can do everything that the Department of Mental Health did, probably do it better. In other words, still deliver the federal constitutional relief mandated by the consent decree, and continued by this court in its subsequent rulings.

You say that -- again, don't assent because I'm taking your nodding to be you agree with me so far. You may not agree. You may have nodded your way into an acquiescence.

You're saying that the Mental Health role was not an essential ingredient here of the constitutional relief, and all you're doing is clarifying the picture, clarifying the roles of the Department of Mental Health and the Department of Corrections.

Now, do I -- is that pretty much what you're saying, Mr. Pardee? Purely administrative matter. DOC can do the job. We don't need the Department of Mental Health there

any longer. We've found a new solution. This is just a statute that we have a right to pass, and this is our job.

MR. PARDEE: I think it's a fair statement of our position, also of legislative intention. I think I would simply say that what the legislature has seen here is what everybody else has already referred to, including the special master, that the -- the two agencies have not worked together in a way that has avoided friction and has delivered treatment as well as security in an efficient way at the Treatment Center.

And perhaps in resolving that source of friction, we may also have found a way to resolve some of the cause of the litigation that Your Honor has referred to previously.

This whole issue of the two agencies inhabiting the same space I think has been the source, perhaps, or has been encouragement of some of the litigation that we've seen; so that, yes, ultimately, it is an administrative transfer of authority.

There is nothing that I have seen in my reading of the cases to suggest that the agency that is responsible is a key issue as a matter of federal law or constitutional law.

And this transfer we see as being a very helpful solution to a particular problem in the management of the Treatment Center.

THE COURT: Let me ask you a few questions, Mr. Pardee.

You say these two agencies have not worked together, and I think everybody has reached that same conclusion, including the Special Master, although I must talk to you a little bit about the Special Master's role in making that conclusion and how much we have a right to rely on it.

While I'm happy to, I have to remember that his appointment was opposed and his report was subject to objection, so I'm not sure we can take it exactly as the last word; but I agree that we can use it, and we can learn from it,

and if something more has to be done, we'll do that, but let's put that off for the moment.

They have not worked together well, you say. No one disagrees with that. I'm not sure exactly why they haven't worked well together, Mr. Pardee, despite what the Special Master said. I'm not sure exactly why, but you're telling me now -- you say they're inhabiting the same space and as a result, we are unable to grant -- unable to provide the treatment. I think that's what you just said.

MR. PARDEE: I certainly don't want to be understood to have said that there is not treatment being provided, but I think the point that I'm trying to make, I think -- if I can express it another way -- is that you have two absolutely essential requirements with respect to managing the Treatment Center.

On the one hand, you have treatment; and on the other hand, you have security. And I think that it is fair to say in hindsight that a consequence of separating those two functions between two agencies has been a certain alienation between the two agencies that has prevented a very comfortable harmonization of the two functions which are necessarily in tension.

But nevertheless, I think, again, just referring to the master's observations, in other states where this function has been handled by the state's Department of Corrections, apparently was without the same tension or alienation that exists or has existed in Massachusetts.

So I propose or put it to the Court based on, in part, on that experience that the master cited but also on the legislature's judgment about this problem that uniting responsibility for the two functions which are, as I've said, in tension, within a single agency has more hope of avoiding this problem of alienation and conflict than separating them between two different agencies and expecting the agencies to work within the same space.

THE COURT: All right. Another thing that you say, Mr. Pardee, is that in the 20 years or so since the consent

decrees were imposed, were signed, there have been significant changes in the treatment of sex offenders, and the method of treatment has changed, and this legislation is designed to -- I think the words you used are reconfigure -- the administration of the Treatment Center so that its statutory purpose is accomplished, and that statutory purpose is treatment as well as security.

Now. Is that a fact, sir? I mean, how do I treat that?

MR. PARDEE: Well, it is -- first I should say it is not certainly a fact that I think needs to be adjudicated for the purposes of these motions.

We cite those changes in professional outlook, although I will say they were not certainly -- I don't mean to say there's any unanimity even now about how to approach this population.

I cite it as, in my view, additional support; but I certainly wouldn't say that our motion turns on those facts either being true or not true.

But I think it is fair to say, again, from a survey of literature -- some of which I think is before the Court -- that a substantial segment of the professional community does view the proper -- does consider that the proper way to treat this population is not on a mental health model but on a behavioral treatment model. And that approach, in particular, is not an approach that is particularly within the Department of Mental Health's ken or statutory mission.

In other words, the Department of Mental Health is -- its mission -- its statutory mission is treatment of people with mental diseases, and there is certainly a very substantial segment of the professional community that does not regard this problem as one having its basis in mental disease so that that, we think, explains on a philosophical level why this transfer of authority makes sense. But we don't mean to put it as an issue of fact.

THE COURT: Well, this new approach outside of what you said is mental health's ken is apparently being adopted

or being used by Doctor Schwartz in her current handling of the program.

MR. PARDEE: That's right.

THE COURT: Do you think that that is a -- do you think that's authority for changing -- do you think that that's enough of a basis for me to accept your assertion that treatment of sexually dangerous persons have changed in the country?

MR. PARDEE: Well, I think certainly in the absence of a challenge to Doctor Schwartz's professional credentials, the Court, under many decisions of the Supreme Court, could and perhaps should defer to her judgment as to how best to approach treatment of this population.

I --

THE COURT: Could I defer? Could I accept that the Special Master's report, including the support of Doctor Beck who examined the program at the special master's request and found that --

Perhaps, Mr. Gleason, you should tell me, but I think Doctor Beck was laudatory in his evaluation, I believe, of Doctor Barbara Schwartz, ultimately agreeing that the joint administration wasn't working but that the approach, on his observations, were sound.

MR. PARDEE: With regard to the Special Master's report, it seems to me -- the Court is quite right that the -- in no sense was there an adjudication, and the report is not a record of findings in an adjudicating sense, but certainly many of the observations are observations drawn from the literature, drawn from the opinion of experts in the field and, in many cases, are observations that no one has disputed -- in fact, reflect a unanimous opinion of those people heard at the hearing.

And in that sense, it seems to me that they do -- and in some cases certainly they provide a factual basis for whatever decision the Court might choose to make in

connection with the state -- the current state of professional opinion with regard to treatment of this population.

With regard to the relationship and how the two agencies have operated, there I think our point, I guess, would be that I don't think anybody has suggested that the agencies have worked harmoniously, and I think the record simply fails to support any such position.

This Court also made findings in this case and has already made the findings necessary to support a finding that the two agencies have not, in fact, been able to work harmoniously and in the most efficient manner or effective manner in delivering care or security, for that matter.

So with regard to the question of professional opinion, again, I think that the special master has made reference to many -- the opinions of many professionals who no one has challenged and who I think it's clear on the record are qualified and eminent people in their fields.

And so I think the Court could, just going directly to those sources, make that finding.

THE COURT: All right. One final question, Mr. Pardee, for the moment, and that is your assertion that these plaintiffs are not deprived of anything, that they're getting exactly what was in the bargain that was contemplated in the consent decree and there is no federal constitutional remedy provided by those consent decrees that's being taken away here.

In fact, you say maybe there isn't even a federal constitutional remedy here. But the *Williams* case was based on constitutional -- alleged constitutional violations, specifically; and the *King* case was based -- it was brought on the basis of alleged violations of the 1st, 6th, 8th, 14th Amendments. Those are federal -- of course those are violations of federal constitutional guarantees.

MR. PARDEE: But I -- I don't mean to say that the cases and the consent-decrees are not -- that underlying those

decrees were not legitimate allegations of violations of federal rights. We are saying --

It simply goes to the question of whether -- the question of where the authority is -- where the authority for management of the facility lies is a question that or a determination that was made based on a requirement of federal law or whether it was a determination necessary to vindicate federal rights.

And I think taking into account that when the decrees were entered, state law specifically said essentially what the decree says in that connection, you can't -- I don't think you can claim that -- or I don't think the plaintiffs can claim that the -- that a remedy for the alleged substantive violations required that responsibility for the Treatment Center be with the Department of Mental Health.

It had to be as a matter of state law. It had to be as a matter of state law so that I don't think it is fair to say that that aspect of the decrees is tied to - is a federal remedy in the sense that some other remedy - the absence of some such requirement might be considered a federal remedy.

And with regard to the question of whether the plaintiffs have or have not lost something they bargained for, this is an extremely important point that I think needs to be made, and perhaps clarified.

The people who signed the consent decree for the state were an assistant attorney general and the defendants, who were executive officials of the state government.

Now, strictly as a matter of state law, none of those people have the power as agents of the people -- which is the only capacity in which they were acting -- to vary statutory law by saying they consent to it. Strictly a matter of state law.

To the extent that the decrees are now in conflict with state law, the only basis for maintaining them -- and I think this has also been said by federal courts -- must be federal law because the --

At the outset, none of the state officials had the authority to bind the state forever to have the management of the Treatment Center and the Department of Mental Health.

So that when the plaintiffs signed the decrees, they could not have done so as a matter of agency law, straightforward agency law, have thought that they were getting a binding commitment that the Treatment Center would be in the responsibility of the Department of Mental Health forever, strictly as a matter of agency law.

Again, the only way that the management can be required to be maintained by DMH is if the Court determines that such a remedy is necessary as a matter of federal law to secure the protection of substantive federal rights.

And there on that question, I -- it is simply -- not only is the record devoid of any basis for such a conclusion, but the evidence -- the experience nationwide which, again, the Master has cited, goes to the contrary.

And in many other states, including Vermont which apparently has a very good program, responsibility for this population lies with the Department of Corrections.

So we say that there is no -- as a matter of federal -- no requirement that the Department of Mental Health rather than the Department of Corrections maintains a responsibility for this facility.

And since -- as a matter of state law -- the responsibility has been shifted, there is no reason for the plaintiffs to claim if this Court modifies the decrees that they are being deprived of something they bargained and won because, again, as a matter of pure agency law, they did not sign an agreement with somebody who had the authority as a matter of state law to bind the Commonwealth forever to that position.

THE COURT: Well, let me for the moment tell you what the plaintiffs are going to say to that. They're going to say that when this was bargained, the leading safeguard of the consent decrees is that the Department of Mental Health

should be in control of the patients and not Department of Corrections.

And when *King* brought his lawsuit, *King* simply said I'm a civilly committed person. I'm here for an indefinite period of time. I'm entitled to constitutional protections. And as a civilly committed patient, I should get those protections, like least restrictive confinement. I should be getting treatment. I should be handled substantially like all other civilly committed patients are handled. Yet, I've got correctional officers who are putting me in solitary confinement for breaches of what they say were security. They do that without consulting psychiatrists. They do that without consulting mental health experts. I'm not getting the constitutional protections that I am entitled to as a civilly committed patient.

So how do you -- how do you say that that wasn't bargained for?

The consent decree resulted from the bargain between the two sides that recognized these protections, and Judge Wyzanski endorsed them in the consent decree.

MR. PARDEE: A minor point, perhaps. Judge Wyzanski -- the consent decrees are not, in fact, final judgments so that it's hot clear at all that even as standard and stringent as *Rufo* has required on a motion to modify a non-final order -- but that's a minor point.

The substantive protections in the decrees, Paragraphs 5 and 6, to the extent that they are still alive and still speak in the present situation, continue.

If the Court allows the motion to transfer authority to the Department of Corrections, the Department of Corrections acquires those responsibilities as successor agency. I think the cases establish that. We've never disputed it.

I don't -- I think on the question -- the question of -- I bring up the benefit of the bargain argument because that has been made by the plaintiffs previously. I don't think it's a legitimate argument.

It's not legitimate and partly because the plaintiffs are alleging that the -- or essentially assuming that the state officials had authority to sign without any limitations which is not the case.

It is also, I think, a somewhat misleading argument because I don't know that there is any signatory of that agreement who is still in the Treatment Center.

It's also perhaps misleading because I don't know that those consent decrees really can be read to apply to anybody other than the people who actually signed the decrees except as a kind of third-party beneficiary.

They are not class actions. The consent decrees were not entered in favor of the class.

But most important, I think, is the point that in institutional reform cases where governmental agencies are -- come under the coverage of a decree, the Court has made it clear that you cannot treat it as a contract once having been made should never be modified.

In fact, it is -- when you are talking about the management of an on-going public institution, I think the Supreme Court has said you are to be particularly concerned and alert to the need for adjustments in the decree as circumstances warrant, and having in mind at all times that federal control of the state public institution ought not to continue beyond the period when it is necessary as a matter of federal law.

So here, we're saying that circumstances that have cropped up in the course of administration of this institution under the aegis of the decrees has shown, I think -- with the unanimous agreement of everybody who has looked at the situation -- that some solution to the problem of divided responsibility for this Treatment Center ought to be found. And the legislature has made a proposal which, on the face of it, is reasonable and consistent with. what's being done in other states, and we think that that is a sufficient basis under *Rufo* for this modification.

THE COURT: Well, I hope it is. Again, I don't know that it is yet. I hope it is because the law in this circuit has been fairly consistent that we ought to give deference to state officials in the handling of these matters.

But still, when you read *Williams v. Lesiak*, the circuit court said the first four paragraphs of the consent decrees, the ones you want stricken, stress that the primary authority of the Treatment Center is with the Department of Mental Health, and it's there because that was the only way that constitutional guarantees could be maintained, according to *King* and to *Lesiak*. That's why you entered into these consent decrees.

All you've done is turn it over to the Department of Corrections, and all you've done is say they will do as good a job, if not better, than the Department of Mental Health.

How do I know that, Mr. Pardee? If you could convince me of that, then that's one thing.

How do I know that that's the case? The legislature has simply not made a proposal. They have passed a law. They did not even -- well, they passed a law.

How do I know that their control would not result in what the intervenors and the plaintiffs say is simply punishment? There will be no more treatment at the center. There will be nothing but punishment. They will be able to do anything they want, and we will never see a therapist again.

How do I know that, Mr. Pardee?

MR. PARDEE: Well, Your Honor, I think that the way -- the assurance that you have is that the Department of Corrections continues to be subject to this decree and fully understands that.

THE COURT: I'm modifying the decree to give them control over security and handling of patients.

MR. PARDEE: Subject to the same strictures in terms of the way in which patients are handled and treated. The --

THE COURT: But I'm not -- all right.

MR. PARDEE: We envision that the Department -- we certainly expect that the Department of Corrections is going to be submitting to the court its plans. We're going to try to be practical in this regard so that the Court will have assurance before something comes up that the department has developed plans that are consistent with the decrees.

At the same time, I do -- I want to repeat what I've said before, and that is that our ultimate plan is to move to vacate the decrees because we think -- we would submit that after 20 years of administration, the decrees have served their function, and the authority over the Treatment Center ought to pass to the state.

There will be an interim period, and we imagine that in the course of consideration, ultimate action on our motion or our future motion, that there will be an opportunity for the Court to take and plaintiffs to take a look at what the plan is and perhaps to have some relatively short period for transition just to test out the proposition that the decrees now should be vacated.

THE COURT: It is a question that is accentuated again by the Special Master's report. I was not unimpressed by the Special Master's description and observations regarding correctional officials' attitudes, articles that he submitted, his own observations, discussions with patients and with therapists and correctional officials themselves that describe the atmosphere of the Treatment Center and how that atmosphere resulted sometimes in denial of treatment, unwarranted sequestration, searches.

Again, I'm not accepting that master's report as a fact given its uncertain position in this litigation except to help us all, as I'm sure I think all of us know how hard Mr. Gleason worked on it and how helpful it has been, but I can't take that as the basis on which to make a ruling one way or the other.

But if I were, that report would not give me the confidence that the Department of Corrections -- exclusive control being given to the Department of Corrections would not create or perpetuate a constitutional violation under *Rufo*. I just don't, you know --

MR. PARDEE: Well, I would like to note that specifically with some of the findings the Court has just referred to, we did specifically take exception to them.

THE COURT: Yes, I --

MR. PARDEE: And we did offer some further information about some of those instances.

THE COURT: Thank you very much, Mr. Pardee. As usual, you presented a comprehensive memorandum and position.

And Mr. Reilly, Mr. Geiger, your position, of course, is that the Commonwealth has not made the required or met their burden of proof that there's a significant change in law or fact.

Mr. Reilly, sir?

MR. REILLY: That is an accurate statement.

THE COURT: There is a change in law; isn't there, Mr. Reilly?

MR. REILLY: There is a change in law, Your Honor, but it is not a sufficient change of law within the meaning of *Rufo* to justify modification of the decrees.

Again, in the brief that we submitted, we cited language from the First Circuit and cited again in the *Lesiak* case in which the First Circuit said that a state court -- pardon me, a state statute that has the effect of thwarting a federal court order enforcing federal rights, that state statute cannot survive the supremacy clause in the US Constitution. That is precisely the situation we have here.

THE COURT: Suppose Mr. Pardee's assertion is correct. The Department of Corrections can do as good a job in treating these patients as the Department of Mental Health -- maybe better -- and by avoiding the tension, administratively, it's a smoother functioning institution.

How do you know that that isn't going to happen, sir?

MR. REILLY: Your Honor, I can't stand here and tell you it's not theoretically possible that that would be the case, but it's clear that the defendants bear of the burden of proof here.

There is no record, no factual record before Your Honor to suggest that that is the case. With all due respect to Mr. Pardee, he has put the cart before the horse here.

He says, we'll, modify the decrees, Your Honor, and somewhere down the road, we'll produce a plan to show you that the Department of Corrections is going to institute policies and procedure that safeguard the patients' rights. He's got it backwards. He has to -- the defendants have to submit evidentiary support, plans, policies, procedures now to prove to Your Honor that DOC will not perpetuate or create constitutional violations before we can go ahead and modify the decrees.

THE COURT: In other words, you want to put the horse in front of the cart?

MR. REILLY: Absolutely.

THE COURT: You say because they haven't produced a plan. What you're saying is that I should wait for them to produce a plan?

They've given me provisions -- Paragraph Number 6, and it says the Department of Corrections shall maintain a treatment program.

What am I -- do I doubt that, the sincerity of that enactment? Is that what you're telling me?

MR. REILLY: What I would suggest, Your Honor, is that given the track record -- and again, I don't concede that there is a factual record before us, but given what the Special Master has indicated about the Department of Corrections, the attitude that pervades that department with regard to the patients at the Treatment Center, there is at least cause for concern with regards to whether the Department of Corrections would maintain and provide the type of treatment to which the patients at the center are entitled.

And, again, let me just clarify. I don't wish in responding to Your Honor's question to concede the point that the first four paragraphs of the consent decrees are merely an administrative issue.

Your Honor did state our position accurately before. We believe that the first four paragraphs are part and parcel of the federal constitutional relief that was agreed to by the parties and enforced and ordered by the Court.

THE COURT: I know, Mr. Reilly, but, again, focus with me a little bit. All they've done is take the words DMH out and put DOC in.

MR. REILLY: That's correct.

THE COURT: Is that a constitutional change?
What is there about substituting one institution for another institution that violates any protection that any patient down there had?

MR. REILLY: To answer that question, Your Honor, we have to look back at the complaint that was filed by Mr. King, and Your Honor referenced this before.

The allegations in that complaint were that it was the Department of Corrections that was interfering with Mr. King's right to treatment; that it was the Department of Corrections that was violating his constitutional rights as part of the bargain that was reached. The Department of Corrections agreed that it would have no role in the Treatment Center other than a custodial one.

So there is a federal constitutional remedy that's been provided here. I don't even think we need to get to the question of whether -- the federal constitutional right in the abstract. There is a federal legal remedy that has been provided by this Court in the discharge of its constitutional obligations.

I would refer again, Your Honor, to the *Lesiak* case, and there is language at 822 F.2d 1231. The issue here is there are provisions, four paragraphs of the decrees, which provide a federal remedy. And the question is not whether the lawsuit would have succeeded had the statute -- the current version of 123A been in effect 20 years ago.

The issue is whether -- let me get the language -- right, is whether the dangers that gave rise to that -- those remedial provisions have been lessened to such an extent that we can now go ahead and modify the decrees.

And that, the First Circuit says, requires a factual inquiry, a factual finding. There is no evidence before Your Honor which would allow the Court to conclude, to make a factual finding, that the dangers which gave rise to the remedial provisions have been evaded and that we would have constitutional violations occurring all over again.

I'm sorry for the long-winded answer. I will try to refocus.

THE COURT: You're very helpful. All of us are struggling with this. I don't think anybody has an answer to it, but I'm required to give you an answer.

What about, Mr. Reilly, Mr. Pardee's assertion I think amply supported by the Special Master and, frankly, in my long -- probably too long -- opinion in *Bruder* and *Pearson*. I had a great deal of difficulty with treatment of sexually dangerous offenders as mentally disturbed patients.

While there were some, I found, that were mentally disturbed, the great majority were not. And Mr. Pardee says it's changed. The Special Master says it's changed. Most states have changed their approach, just as we're in

Massachusetts changing our approach even under the current regime, current administration.

Is there any future in examining that these patients should be treated differently than they were in the past? This is not a mental health problem. This is a treatment problem.

Different means of treatment, behavioral sciences have taught us something, not including -- not amounting to mental health.

Should I go down that road with you?

MR. REILLY: Well, we can certainly go down the road now. Perhaps at some point I should defer to Mr. Geiger on the issue, but I will respond to Your Honor.

First, I would submit that there has not been, in fact, the type of change alleged by the defendants as articulated by Mr. Pardee -- and Mr. Geiger, on behalf of the intervenor-plaintiffs, attached to his brief an article written by Doctor Kozol in the very early 1970s. I believe he was one of the first directors of the Treatment Center.

THE COURT: That was 1972.

MR. REILLY: Yes, but the position which he articulated then with regard to the treatment of sexual dangerousness is the very position which the defendants now suggest is some new wave of thinking.

So there has not been the type of change in the professional community which they suggest. And again, at bottom, there is no factual record to support that.

We have here assertions that that is the case, but there's no proof before Your Honor to indicate that is, in fact, the case.

I would submit it is not, in fact, the case; and what's more, that type of change is not the type of factual change or change in factual circumstance which *Rufo* contemplated.

What *Rufo* contemplated when it talked about a change in factual circumstances was a change in demonstrable demographic circumstances. We had a sudden increase in the population at the Charles Street and Nashua Street jails.

*Rufo* cites other cases, one from New York state, I believe, which dealt with an overcrowded mental retardation facility which the decree said we'll place people in separate housing units of 15 or fewer residents. They simply could not find the right number of houses with 15 or fewer beds. Those are demonstrable demographic changes.

What we have here is an alleged change, a subjective attitudinal change on a part of the portion of a professional community that's not the same type of demonstrable demographic change.

And once more, there's no proof, so I think that would not be good ground for Your Honor to modify the decrees.

THE COURT: All right. Mr. Reilly, thank you.

Let me turn to Mr. Geiger to perhaps enlarge, if you want to, on that last point. There is some suggestion here that in the cases that a careful case-specific inquiry must he made before changes in these consent decrees should be undertaken.

I think you cited that case to me, but I'm not sure -- what was it, *Hogan* or *Cianci* --

MR. GEIGER: I think it was the *Cianci* case. That's right. I think that was the case, although it involved, if I recall, a petition to vacate the decree as opposed to modify it.

That was a case where the First Circuit itself held that a change in state law was not adequate grounds to modify a federally based decree.

THE COURT: Correct. Let me not digress. I want to keep you on the first point. Please have in mind -- tell me what is meant by a case-specific inquiry as they mentioned in *Cianci* and what I could do in this case.

The first point that Mr. Reilly began and I know that you wanted to talk to because you submitted it, Doctor Kozol's article.

You and I, of course, have been down this road before, Mr. Geiger, with regard to treatment. We agonized or at least I did, and you advocated and I agonized over the result. But what about treatment of the civilly committed, not mentally ill patients at the Treatment Center.

MR. GEIGER: Your Honor, I think it's very important to answer all of these questions with a strict reference to the *Rufo* decision.

So what is the relevance of this bit about the treatment philosophy? How does that fit into the *Rufo* parameters? Certainly not a change in law. It's a change in fact. I think everybody can see that, and I think I understood Mr. Pardee to say that the Commonwealth was not resting on that at this point and it was not premising its motion on that.

Obviously, there are zero facts in the record of this proceeding right now. The Master took no evidence under oath, no evidence period. There's been no evidence here. I just think there are no facts to support a finding of a change in treatment philosophies or whatever.

I think you would have to take evidence on that, and I think we've introduced -- just sort of like there are articles in the literature that Mr. Pardee says, you can read them, Your Honor.

Well, we have given you an article by Doctor Kozol that talks about the same treatment philosophy prevailing when these decrees were written as today. So that would certainly cut against a finding of significant change; but more importantly, what's the nature of these changes if I understand them?

The change is that the therapy has become more behaviorally oriented -- the therapist relapse prevention and all these sort of magic buzz words -- not individual psychotherapy.

So there's a different approach, but who is providing this therapy, Your Honor? Is it Department of Correction officers? No, it's being provided by people within the mental health field.

This is something that is plainly within DMH's purview so I don't see even if there were a factual record in a change of treatment philosophy that it would support a change in who should run the facility.

The only kind of factual change that I could see that could possibly relate to who should run the facility would be this issue of the difficulty of the two agencies working together.

And, again, I don't think we have a record on that. In fact, to the extent we have a record, we have the record that that was one of the very problems motivating this case in the first place. That's why it was brought.

DOC was in the facility, DMH was in the facility, and the decree was, in part, trying to deal with that very tension.

So the Supreme Court in *Rufo* says we have to look to see whether factual-changes are unforeseen, and if not, there's an extraordinarily heavy burden to have factual changes justify changing a decree.

To say that it was unforeseen that there would be tension between DMH and DOC is to fly in the face of the very words of the complaint that started this case.

So I just think there is no basis at all in the record for a factual change. I should also point out that the Commonwealth moved -- and Your Honor would probably recall it -- actually to vacate the decrees back in the course of the *Pearson* litigation as sort of counter-relief to what the *Pearson* plaintiffs were seeking. They moved to vacate the decrees.

And so *King* was reopened; this case was reopened at that time, and we were looking to intervene in this case at that point to oppose it -- we, the plaintiffs.

And it seems to me there's an issue also of when is the appropriate time period over which a change has to be demonstrated because they had a full opportunity to litigate, to ask for the decrees to be vacated or modified and to raise these same points.

So the idea -- if their burden is to prove a change since that motion was brought and fully litigated and denied by Your Honor, I suggest there's nothing there as well.

So I don't think there's anything on the factual side. I think the key question here comes down to really two things. One Your Honor pointed to right at the outset -- this just sort of an administrative detail of the decrees.

If so, maybe it's not governed by the *Rufo* standard. That would be -- that would be something different.

But if it's other than that, if it's related to federal rights, then you have to go to the *Rufo* standard, and I want to point Your Honor's attention to Footnote 7 in the *Rufo* case because I think it divides the world of consent decree provisions into two categories:

One is a category containing any provisions "that arguably relates to the vindication of a constitutional right," and then the other is "minor changes in extraneous details," and they give as examples of that the paint color on a building or design of its exterior.

To analogize, who is in control of the patients to a change in the paint color would be patently absurd, and the Court makes very clear in *Rufo* that in looking at a change in the law, you do not relitigate whether there was a constitutional right to have a particular provision in this case under DMH control. That issue was settled.

There was uncertainty about whether there was a constitutional right but as Mr. Reilly points out and Footnote 7 says, the only question is whether the Court's relief, agreed to by the parties, was arguably related to the vindication of the federal right, and Your Honor has cited all the reasons why it was.

The decree pleads only federal claims. The complaint pleads that DOC violated and that DMH was the protector of the rights. And the First Circuit has said all this so what could be more arguably related to getting treatment than putting control in the hands of DMH.

So I think we are squarely within *Rufo* and squarely within Mr. Reilly's point about the supremacy clause. Change in state law can't justify rewriting a decree that vindicates federal rights. The state can't get out of any decree by passing the law that's hostile to the intent of the decree, and I think Mr. Pardee's points are totally incorrect.

The plaintiffs did not thank that they had a decree in perpetuity, obviously not. They believed they're equitable rules that might allow for modifications, but you've got to be true through the *Rufo* standard, and we don't have it met here.

THE COURT: How do we get there?

MR. GEIGER: Well, I mean, the burden is on the Commonwealth, Your Honor. If if they seriously want --

THE COURT: That was not a fair question. I'm sorry.

MR. GEIGER: All right.

THE COURT: That is the question I have, but it's not a fair question at this time. At this time, it's not a fair question.

Obviously, we've all given this a lot of thought, and I've given it a lot of thought since our last meeting -- even prior to our last meeting -- and I'm not going to take the matter under advisement because on the record that is now before me, and incorporated into that record, everything that I have learned about the case and found in the case from the trials of the ***Bruder*** and the ***Pearson*** cases, I will conclude at this time that the defendants have not sustained their burden of showing a significant change in law or fact under *Rufo*.

I do find that the consent decrees sought to address federal constitutional violations articulated by *King* and in *Williams*.

A critical component of the remedy provided by the consent decrees was that the Department of Mental Health was in control of the Treatment Center which was to provide, in part, a check on the Department of Corrections, which compromised treatment.

I conclude that the Department of Mental Health is an essential part of the decree, and on the record before me at this time, the Department of Corrections has done nothing yet that I can see which warrants my placing confidence in its ability to deliver treatment, patient treatment.

I conclude at this time that the Department of Corrections' control of the Treatment Center compromises the federal constitutional remedy which the consent decree sought to impose, and would compromise the federal constitutional rights which the consent decrees sought to protect.

Even today, as Mr. Geiger pointed out, if there has been a change in the treatment model and it has been as the Master has indicated and the commentators have found is a better way to approach this problem, that's being done under the authority of the Department of Mental Health, under Doctor Barbara Schwartz's direction, of course, but they are providing the current treatment.

Will the Department of Corrections provide that same treatment? That's not shown. If they were to provide that treatment, if there were to be a case-specific inquiry in what the Department of Corrections was going to do and proposed to do, then perhaps I would be able to rule otherwise. But at this point, there is not that showing. So that is my ruling.

Now, if you'll stay for just a moment, I'm going to -- I just want to raise again, counsel, where do we go from here?

Again, I did this before we did the *Bruder* case, before we did the *Pearson* case, after we did the case. Throughout

this litigation I've done it, and I've asked counsel to work together and involve me if you had to involve me about how do we solve a problem which everybody concedes exists.

How do we remedy a situation which everybody believes is unworkable I've done nothing today to make it any easier on any side except to leave here and go on as we have.

That hasn't helped in the past. And, as I say, I've done nothing to advance a further consideration of these consent decrees, a negotiation of new consent decrees.

I only make this ruling with the hope that the Commonwealth will think in ways to modify the consent decree in a way that's acceptable to continue the federal remedies which were provided by the consent decrees.

I would like a plan of some kind. I would like a proposal of some kind. I would encourage counsel to consult, involve me, involve the special master. It's part of his appointment, I believe.

When I appointed Mr. Gleason, I asked, among other things, that he report and make recommendations on the operation at the Treatment Center and its ability to render appropriate treatment consistent with its purpose and the consent decrees, and report and recommend revisions to the consent decrees to the extent advances and knowledge of sexual dangerousness may have been appropriate.

I really wanted to focus on that last paragraph, Paragraph 5 of the order. I would like Mr. Gleason to continue in his role subject to the same order because I think it is broad enough. It was drafted broadly in order to give me his assistance, but I recognize that my appointment of Mr. Gleason was only to provide me with assistance, and he was not to -- and he could not then have made findings or have bound me or counsel in any way. I want him to continue in his role as Special Master.

I want to know if counsel have any objection to his continuing and continuing under the same conditions as were

originally set, that the Commonwealth would for some period of time bear the cost, understanding that pro se plaintiffs would not be in the position to do so.

I don't think that compromises his impartiality or his integrity, but I would like to have counsel's thoughts on that. If you're not prepared to give those thoughts to me now, I will appreciate having them sometime soon.

As I say, the-motions have been denied. I don't know what will happen. Perhaps the Court of Appeals will receive it. That is certainly a right. I don't discourage it in any way; but I think eventually, counsel, you're going to be right back down here before me at some point, and we're going to be right back where we started.

I'd like not to let you out of this courtroom until I have something resolved, but I've been trying to resolve this matter since 1990, you see, since 1991. In some way in this room there's got to be enough brains -- and that does not include me -- that could put their minds to work on seeing how Chapter 123 can be accommodated by a modification on these consent decrees which gives -- which everybody knows is required -- treatment to civilly committed patients, and security and public safety on the other hand.

There's got to be some way to do that. I know there's a way to do that. I cannot do it, unfortunately, without you, so I would ask that you devote yourselves to that.

I would ask you to advise me on what you consider Mr. Gleason's role to be. I do not want Mr. Gleason to be put in the position where his advice to me in any way compromises this litigation. I want that clarified. If you can advise me within the next week or so your position on those issues, I would be grateful.

MR. GEIGER: Your Honor, might I say something right out? I would be happy to submit something in writing, but this is with great regret I say this and all respect for Mr. Gleason's talents and the work he's put in on this case so far, but respectfully, I would have to say we, the

intervenor plaintiffs, would continue to press the same objections that we had to Mr. Gleason's original appointment.

I think Your Honor has reserved -- has resolved the only outstanding motion in this case. There is no further outstanding motion in this case.

I appreciate the Court has a concern about the inherent tension between two agencies involved at the Treatment Center. I suggest that that tension is only due to a failure of political will on the part of the administration to comply with the decrees.

This is an area where it is not politically popular to be giving treatment to people who are sex offenders, but the decree provides the framework. DMH runs the place. It administers treatment.

Corrections' role is limited to providing the security only. That is a perfectly workable solution, and the Commonwealth ought to concentrate on actually complying with the law.

THE COURT: Well, all right. I think I've heard that argument before. I don't know that it's working perfectly well.

In your -- perhaps not your clients but the 48 plus one plaintiffs specifically requested the appointment of a receiver and if -- I'm sorry, Mr. Reilly, you rose to say something?

MR. REILLY: Oh, no. Perhaps I incorrectly anticipated Your Honor had a question about the --

THE COURT: Oh, no. I think at one point, originally, Mr. Reilly, way back in the pleadings which perhaps you've not had a chance to totally familiarize yourself with there was a request by your client to appoint --

MR. REILLY: I have seen that.

THE COURT: And if I do say so, what I received from them in my -- and my last letter came this morning from Mr. Rector -- I think he writes to me more often than Mr. Gleason writes to me. I suppose that's good.

MR. REILLY: I suppose it is.

THE COURT: This letter, actually, is from Mr. Pardee. But if there were, Mr. Geiger, to be some kind of case-specific inquiry which, again, I took from your brief, *Cianci* -- I know it's a different situation, but if there were to be, would it not be a good idea to have somebody on the site?

Would there not be some kind of monitoring that should take place? Unless things are going so well that you have no complaints about how the situation is being managed today, shouldn't we try to do something about it?

MR. GEIGER: Absolutely, Your Honor, but that's a completely different proposition to have an on-site monitor than the goal of enforcing the provisions of the decree which is definitely something I think we ought to have to do than to have someone appointed to try to figure out ways to change the law absent another motion and an appropriate evidentiary showing that the decrees ought to be changed, so that's my problem.

The appointment of the master unfortunately really was to do the Commonwealth's work, to investigate and think up grounds to modify the decree.

I think an enforcement monitor, someone out there to monitor whether the decrees are being complied with to report back to the Court and then possibly to have enforcement proceedings, further injunctions or contempt, that would be perfectly appropriate from the intervenor plaintiff's point of view.

THE COURT: Well, I think in order to focus the argument a little on this last point, I really would like to have something in writing, your position, just a brief position on the matters I've raised.

I suggest it because I want the record to be complete. My ruling is contained in the order which has been dictated. You're free to have tat. Just give me a chance to edit all of the little grammatical and other errors out of it; but otherwise, my ruling has been made.

Jill, just give me the transcript if they want it. I think maybe we may have -- I think maybe we will be providing the Court of Appeals with another issue here, and I think in light of the fact that we're not going to go anywhere from this point on unless we resolve this question, I think Mr. Pardee probably should test my interpretation of *Rufo*.

I'm not recommending it, Mr. Pardee, but I think maybe you're entitled to do that and probably going to be required to do it, and I want the record complete. All right. Thank you very much.

(Recess.)